IN RE APPLICATION OF TAY SOON PANG; EX P

HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[ORIGINATING SUMMONS NO: MT(3) 24-1757-2008]
25 NOVEMBER 2008

EVIDENCE: *Presumption - Death - Person missing for more than seven years - Declaration to presume person dead - Application for - Whether allowed - Evidence Act 1950, ss. 107, 108*

The applicant sought a declaration that one Thye Tian Poh, who had not been heard of or seen for more than seven years by those who would naturally have heard of him if he had been alive, be presumed dead. The reason for this application was to enable the applicant to pursue matters relating to the grant of letters of administration since Thye Tian Poh would appear too have died intestate in respect of certain properties situated in Malaysia.

Held (allowing the application):

(1) The applicant was the son of the deceased. His father was born in China in 1899 and came to Malaysia around the year 1914 and had domiciled in Kota Tinggi. In 1970, his father went back to China to stay together with his family and relatives who were domiciled in China. The deceased had communicated with the applicant's late mother by letters. It was disclosed that since 1982 neither the applicant nor his late mother had received any information regarding the deceased. They had not heard from him since then. The deceased also did not communicate with any of his other relatives or friends in Malaysia. The applicant believed that his father had died in China and had his father still be alive, his age would be about 108 years old. (para 13)

(2) The applicant's late mother was one of the persons who would naturally hear from the deceased if he were alive. When a person who had regularly kept in touch with his wife until 1982 and thereafter nothing was heard of him, he must be presumed to be dead. From 1982 until now, there was absence of any evidence from which the applicant could have reasonably concluded that his father was still alive. Thus, this court ruled that Thye Tim Poh be presumed dead. (para 14)

Case(s) referred to:
Bradshow v. Bradshow [1956] P274 ***(refd)***
Bullock v. Bullock [1960] 2 All ER 307 ***(refd)***
Chard v. Chard [1956] P259 ***(refd)***
Chipchase v. Chipchase [1939] P391 ***(refd)***
Kamlabai v. Umabai AIR 1929 Nag 127 ***(refd)***
R Muthu Thambi v. K Janagi [1955] 1 LNS 106 HC ***(refd)***
Re Ex Parte Application of Ridzwan Ibrahim (Presumption of Death) [2002] 4 CLJ 502 HC ***(refd)***
Re Osman Bachit [1997] 2 CLJ Supp 269 HC ***(refd)***
Smt Mathru v. Smt Rani AIR 1986 HP ***(refd)***
Willyms v. Scottish Widows' Fund Life Assurance Society [1889] 4 TLR 489 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 107, 108
Rules of the High Court 1980, O. 71 r. 25

For the applicant - Atikah Osman; M/s Mak Ng Shao & Kee

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JC:

[1] By this originating summons dated 9 June 2008, Tay Soon Pang @ Yeo Hak Seng ("the applicant"), seeks a declaration that Thye Tian Poh, who has not been heard of or seen for more than seven years by those who would naturally have heard of him if he had been alive, be presumed dead.

[2] The application was supported by the affidavit of the applicant who is the son of the person in respect of whom the presumption of death was sought for. The material parts of the applicant's affidavit read as follows:

> 1. Saya adalah anak kepada Thye Tian Poh (selepas ini dirujuk sebagai "Bapa saya"). Setiap salinan Kad Pengenalan dan Surat Akuan Kerakyatan Bapa saya dan Kad Pengenalan dan Sijil Warganegara saya dilampirkan di sini dan ditanda sebagai "ekshibit TSP-1".
>
> 2. Segala fakta-fakta yang disebutkan dalam Afidavit ini adalah dalam pengetahuan saya sendiri kecuali dinyatakan sebaliknya.

3. Bapa saya dilahirkan di negara Cina dalam tahun 1899 dan telah datang ke Tanah Melayu pada sekitaran tahun 1914. Semasa di Malaysia, Bapa saya pada kebanyakan masanya menginap di Kota Tinggi, Johor.

4. Dalam sekitaran tahun 1970, bapa saya telah balik ke negara Cina untuk tinggal bersama ahli-ahli keluarga dan saudara-maranya yang masih berada di sana.

5. Pada mulanya, saya masih mendapat khabar mengenai bapa saya melalui surat-surat yang dihantar oleh Bapa saya kepada mendiang emak saya, Lim Ah Kiow (P) (selepas ini dirujuk sebagai "mendiang Emak saya"), yang telah meninggal dunia di Kota Tinggi, Johor pada 21hb. Februari 2000. Setiap salinan Kad Pengenalan dan Sijil Kematian mendiang Emak saya dilampirkan di sini dan ditanda sebagai "ekshibit TSP-2".

6. Semenjak tahun 1982, saya dan mendiang Emak saya tidak lagi mendapat sebarang khabar mengenai Bapa saya.

7. Setakat pengetahuan saya, sejak masa itu juga, Bapa saya tidak pernah menghubungi ahli-ahli keluarga saya yang lain ataupun rakan-rakannya.

8. Saya sesungguhnya percaya bahawa Bapa saya telah meninggal dunia di negara Cina. Jika Bapa saya masih hidup sekarang, ia akan berumur lebih kurang 108 tahun.

[3] The reason of this application is to enable the applicant to pursue matters relating to the grant of letters of administration since Thye Tian Poh would appear to have died intestate in respect of a certain properties situated in Malaysia. Heliliah Mohd Yusof J. (as she then was) in *Re Ex Parte Application of Ridzwan Ibrahim (Presumption of Death)* [2002] 4 CLJ 502 had occasion to opine:

> Generally, the registrar will not allow any grant to be issued until after all inquiries which he may seem fit to make, have been answered to his satisfaction. Consequently, the petition may fail where the documents with regards to the death of Sheikh Mohamed bin Sheikh Ali is not produced. The general principle is that succession to the immovables of an intestate is governed by the law of the country where the immovables are situated. However, succession to the movables of an intestate is governed by the law of his domicile at the time of his death.

[4] However, at this stage of proceedings, the applicant has not yet applied for letters of administration and no doubt at the time of such application the fact that Thye Tian Poh last domiciled in China, will have to be taken into account at the time of the inquiry by the registrar. An inquiry about the person who will be entitled to be granted the letters of administration will invariably arise during the course of the inquiry to be made by the registrar pursuant to O. 71 r. 25 of the Rules of the High Court 1980. The applicant needs to prove the death of the deceased in that proceeding.

[5] I am satisfied that these are matters which come within the ambit of s. 108 as under that section:

(i) no presumption can arise as to when a person died; and

(ii) such a presumption arises for consideration only when there is a dispute in a court or proceedings as to whether a person is alive or dead.

[6] It was held in *Smt Mathru v. Smt Rani* AIR 1986 HP, that there is no presumption that a person who has not been heard of for a period of not less then seven years died at the end of the first seven years or on any particular date. The burden of proving the date of death of a person is always upon the person who asserts that a person had died on a certain date because there is no presumption about the date of death. The presumption is that a person is dead if he has not been heard of for seven years and this presumption only arises when a question is raised in court or proceedings, as to whether a person is alive or dead. S. 108 reads as follows:

> When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

[7] This is commonly referred to as the presumption of death. The presumption of death is an exception to the presumption of life. In *Re Osman bin Bachit* [1997] 2 CLJ Supp 269, per Augustine Paul JC (as he then was), it was stated that the Evidence Act s. 107 deals with the presumption of continuance of life and s. 108 of the Act deals with the presumption of death. The Evidence Act s. 107 provides that when a person's existence is in question and he is shown to have been living at a given time

within 30 years and there is nothing to suggest the probability of his death, the continuance of life will be presumed and the person who asserts the contrary has the burden to prove it. The Evidence Act s. 108 must be read as a proviso s. 107 as s. 108 provides that if a man has not been heard of for seven years by these who would normally have heard of him, had he been alive, the presumption of continuance of life ceases and the burden of proving him to be alive lies on the person asserting it by denying the death.

[8] In order to invoke the presumption of death, two basic facts must be proved:

(1) that the person must not have been heard of for seven years; and

(2) he must not have been heard during that time by those who would naturally have heard of him.

There is a conflict of authority as to whether the presumption arises without proof or admission of the fact that all due enquiries appropriate to the circumstances have been made. (See *Willyms v. Scottish Widows' Fund Life Assurance Society* [1889] 4 TLR 489 and *Chipchase v. Chipchase* [1939] P391; cf *Bradshow v. Bradshow* [1956] P274]. The explanation is probably that the extent of the enquiries to be made depends upon the circumstances of the case in question, and that in some cases the circumstances are not appropriate to the making of any enquiries whatsoever (see *Bullock v. Bullock* [1960] 2 All ER 307). There is some authority that proof of the third basic fact may render proof of the first unnecessary, presumably on the basis that to adduce evidence that a person has made all due enquiries appropriate to the circumstances is also, in some cases, to adduce evidence of a person who would be likely to have head of the absent person.

[9] In *Chard v. Chard* [1956] P259, the presumption did not arise because there was no evidence of the first basic fact, that is of persons likely to have heard of the person whose death was in question. The parties to a marriage celebrated in 1933 sought decrees of nullity on the ground that the husband had been party to a marriage celebrated in 1909. The first wife, in respect of whom there was no evidence of ill health or registration of death, was last heard of in 1917 and 1933, the presumption could not

A apply. Applying the presumption of fact as to the continuance of life, it was inferred that the first wife was alive in 1933. Accordingly, it was held that the ceremony of that year was null.

[10] In *R Muthu Thambi v. K Janagi* [1955] 1 LNS 106 the facts B were that in 1929 the wife married a man and lived with him for two years, after which he was imprisonment for one month for misappropriation of money; and after coming out of prison the wife's father gave him some money with which he absconded to India. The wife had not heard from him since. The court held that C the application by the wife to have the presumption invoked could not be sustained because the wife would not have heard from her husband in any event. It was held in *Kamlabai v. Umabai* AIR 1929 Nag 127 that a wife who has left her husband and is kept as a mistress by another person is not a person who would D naturally hear from the husband, if he was alive.

[11] *Prudential Assurance Co v. Edmonds* concerned the second basic fact, that the person whose death is in question has not been heard of. In a claim on a policy of life assurance, it was E alleged that the assured, one Robert Nutt, was not dead. Members of the family gave evidence that they had not heard of him for more than seven years but knew that his niece believed that she had seen him in Melbourne, Australia. The niece gave evidence that when she was aged 20, standing in a crowded F street in Melbourne, a man passed her whom she recognised as her uncle. She did not speak to him because he was lost in the crowd as she turned to do so but said he resembled her uncle as she remembered him from five years earlier. The House of Lords, being in no doubt that it fell to the tribunal of fact to decide G whether or not to accept the niece's evidence, held that if the jury had been satisfied that she was mistaken, the basic facts giving rise to the presumption would have been established.

[12] To summarise, the principle discernible from the above case is this: The mere facts of his not having been heard of affords no H inference of his death, for in certain circumstances, it is probable that he could never be heard of again by his relatives. The onus of proving death must rest with the person to whose case that fact is essential. If the circumstances of a man's disappearance are such that it is unlikely that his relatives would have heard of him I in any event then the court will not presume his death.

[13] To revert to the application before the court, the applicant who had affirmed supporting affidavit for the application is the son of the deceased. His father was born in China in 1899 and came to Malaysia around about the year of 1914 and most of the time domiciled in Kota Tinggi. In 1970, his father went back to China to stay together with his family and relatives who are domiciled in China. The deceased communicated with the applicant's late mother (Lim Ah Kiow) by letters. It is also disclosed that since 1982 neither the applicant nor his late mother have received any information regarding the deceased. They had not heard from him since then. The deceased also did not communicate with any of his other relatives or friends in Malaysia. The applicant believed that his father had died in China and had his father still alive, his age would be about 108 years old.

[14] The court is satisfied that the applicant's late mother is one of the persons who would naturally hear from the deceased if he were alive. The court is of the opinion that when a person who had regularly kept in touch with his wife until 1982 and thereafter nothing was heard of him, he must be presumed to be dead. From 1982 until now there is absence of any evidence from which the applicant could have reasonably concluded that his father is still alive.

[15] I find, therefore, that this application is to be allowed. Accordingly, I rule that Thye Tim Poh be presumed dead.